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Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(C)(A)-846–04 OF 2018
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
9 NOVEMBER 2018

C

Building and Construction Law — Construction contract — Adjudication — Claimant sought to enforce adjudication decision — Respondent did not apply to set aside adjudication order — Whether open to respondent to raise any grounds under s 15 of the Construction Industry Payment and Adjudication Act 2012 without filing application under s 15 itself — Construction Industry Payment and Adjudication Act 2012

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This was an appeal against the High Court's decision in dismissing the appellant's application to enforce an adjudication decision dated 25 May 2017 rendered in its favour. Pursuant to a letter of acceptance dated 13 November 2014, the appellant accepted its appointment by the respondent, as the subcontractor in a project. The appellant carried out and completed the subcontract works on 14 April 2015 and pursuant to the respondent's instructions, the appellant demobilised and left the site on 24 April 2015. In the course of the subcontract works, the appellant submitted to the respondent a total of eight progress claims between 24 December 2014 and 14 April 2015. Of the eight progress claims, progress claims Nos 1, 2 and 3 were partially honoured while progress claims Nos 6, 7 and 8 were unpaid. The appellant then invoked the adjudication regime under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') alleging non-payment of its progress claims. The appellant, as claimant, served on the respondent a payment claim and the respondent served its payment response on the appellant, disputing the entire amount. The appellant issued a notice of adjudication for the same sum stipulated in the payment claim. On 25 May 2017, the learned adjudicator gave his decision which was in the appellant's favour and directed the respondent to pay the adjudicated sum. However, the respondent did not pay. In December 2017, the appellant filed an application pursuant to s 28 of the CIPAA 2012 seeking inter alia to recognise and enforce the adjudication decision dated 25 May 2017. The respondent did not file any application to set aside the adjudication decision under s 15 of the CIPAA. The respondent only objected to the application, contending that the adjudicator had acted beyond his jurisdiction in allowing the sum of RM773,484.52. The respondent argued that there were 'clear and unequivocal errors' committed by the adjudicator in which case the application under s 28 of the CIPAA must be refused. The appellant submitted in response that since the respondent did not

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apply to set aside the adjudication decision, the respondent must be taken to have accepted that decision but has 'willingly refused to comply'. Relying on s 15(d) of the CIPAA, the learned judge held that it was for the court to intervene when the adjudicator had acted beyond his jurisdiction. The issue for consideration was whether it was open to the respondent who was resisting or opposing an application for enforcement under s 28 of the CIPAA, to raise any of the grounds under s 15 without actually filing an application under s 15 itself.

Held, allowing the appeal:

(1) It was not open to the respondent to invoke any of the grounds set out in s 15(a)–(d) of the CIPAA in opposition to an application under s 28 of the CIPAA without at the same time, filing an application under s 15 of the CIPAA itself to set aside the adjudication decision on any of those grounds. To accede to the respondent's submission that the court may avail itself to and dismiss an application for enforcement under s 28 of the CIPAA by reason of any or all of the grounds under s 15 of the CIPAA would do violence to the terms of s 28 (see para 22).

(2) From a reading of the CIPAA 2012, it was plain that though s 28 vested the High Court with discretionary power, it did not extend to requiring the applicant to show that there were no grounds for setting aside the adjudication decision under s 15 of the CIPAA. When the applicant satisfied the High Court that there was an adjudication decision that had been rendered in the applicant's favour, that there had been non-payment of the adjudicated sum by the date specified in the adjudication decision, and that there was no prohibition to the grant of the order that was sought, the order to enforce ought to be granted. The appellant had amply satisfied the conditions (see paras 25–27).

(3) From a proper reading of ss 13, 15, 16 and 28 of the CIPAA, the binding effect of the adjudication decision was automatic; hence the need for any dissatisfied or aggrieved party to first apply to set aside the adjudication decision. This was evident from the terms of s 15 of the CIPAA (see para 41).

(4) A dismissal of the appellant's application for enforcement on the ground of excess of jurisdiction without at the same time, setting aside that adjudication decision would not only give a construction and interpretation which will defeat the purpose of the CIPAA 2012, but would leave the parties and the court in an incongruous and untenable position. The law gave the respondent the option of filing an application to set aside the adjudication decision on any or all of the grounds provided in s 15 of the CIPAA. Unless that option was exercised, the respondent must comply with the decision (see paras 56–57).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu untuk menguatkuasakan keputusan adjudikasi bertarikh 25 Mei 2017 yang diberikan kepadanya. Menurut surat penerimaan bertarikh 13 November 2014, perayu menerima pelantikannya oleh responden, sebagai subkontraktor dalam satu projek. Perayu menjalankan dan menyelesaikan kerja-kerja subkontrak pada 14 April 2015 dan menurut arahan responden, perayu berpindah dan meninggalkan tapak tersebut pada 24 April 2015. Semasa kerja subkontrak, perayu mengemukakan kepada responden sebanyak lapan tuntutan kemajuan antara 24 Disember 2014 dan 14 April 2015. Daripada lapan tuntutan kemajuan, tuntutan kemajuan No 1, 2 dan 3 sebahagiannya dipenuhi manakala tuntutan kemajuan No 6, 7 dan 8 tidak dibayar. Perayu kemudiannya meminta rejim adjudikasi di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta') yang mendakwa tidak membayar tuntutan kemajuannya. Perayu, sebagai pihak yang menuntut, menyampaikan kepada responden satu tuntutan bayaran dan responden menyampaikan bayaran balasan kepada perayu, yang mempertikaikan jumlah keseluruhan. Perayu mengeluarkan notis adjudikasi bagi jumlah yang sama yang dinyatakan dalam tuntutan pembayaran. Pada 25 Mei 2017, adjudikator yang bijaksana memberikan keputusannya menyebelahi perayu dan mengarahkan responden membayar jumlah diadili. Walau bagaimanapun, responden tidak membayar. Pada Disember 2017, perayu memfailkan permohonan selaras dengan s 28 Akta 2012 memohon antara lain untuk mengiktiraf dan menguatkuasakan keputusan adjudikasi bertarikh 25 Mei 2017. Responden tidak memfailkan sebarang permohonan untuk mengetepikan keputusan adjudikasi di bawah s 15 Akta. Responden hanya membantah permohonan itu, dengan menyatakan bahawa adjudikator telah bertindak di luar bidangkuasanya dengan membenarkan jumlah sebanyak RM773,484.52. Responden berhujah bahawa terdapat 'kesilapan yang jelas dan nyata' yang dilakukan oleh adjudikator yang mana permohonan di bawah s 28 Akta harus ditolak. Perayu menyatakan bahawa oleh kerana responden tidak memohon untuk mengetepikan keputusan adjudikasi, responden dianggap untuk menerima keputusan itu tetapi telah 'rela menolak untuk mematuhi'. Bergantung pada s 15(d) Akta, hakim yang bijaksan berpendapat bahawa ia adalah bagi mahkamah untuk campur tangan apabila adjudikator bertindak di luar bidang kuasanya. Isu untuk pertimbangan adalah sama ada ia terbuka kepada responden yang menentang atau membantah permohonan untuk penguatkuasaan di bawah s 28 Akta, untuk menaikkan mana-mana alasan di bawah s 15 tanpa memfailkan permohonan di bawah s 15 itu sendiri.

Diputuskan, membenarkan rayuan:

(1) Ia tidak terbuka kepada responden untuk menggunakan mana-mana alasan yang dinyatakan dalam s 15(a)–(d) Akta bertentangan dengan

permohonan di bawah s 28 Akta tanpa pada masa yang sama, memfailkan satu permohonan di bawah s 15 Akta sendiri untuk mengetepikan keputusan adjudikasi atas mana-mana alasan tersebut. Untuk menyetujui hujahan responden bahawa mahkamah boleh memanfaatkan dan menolak permohonan untuk penguatkuasaan di bawah s 28 Akta oleh sebab mana-mana atau semua alasan di bawah s 15 Akta akan melakukan penganiayaan kepada s 28 (lihat perenggan 22).

(2) Dari pembacaan Akta 2012, adalah jelas bahawa sekalipun s 28 memberikan kepada Mahkamah Tinggi dengan kuasa budi bicara, ia tidak dilanjutkan untuk menghendaki pemohon menunjukkan bahawa tiada alasan untuk mengetepikan keputusan adjudikasi di bawah s 15 Akta. Apabila pemohon memuaskan hati Mahkamah Tinggi bahawa terdapat keputusan adjudikasi yang telah diberikan menyebelahi pemohon, bahawa tiada pembayaran jumlah diadili dari tarikh yang ditetapkan dalam keputusan adjudikasi, dan tiada larangan untuk pemberian perintah yang dipohon, perintah untuk menguatkuasakan sepatutnya diberikan. Perayu telah cukup memuaskan syarat-syarat (lihat perenggan 25–27).

(3) Dari pembacaan ss 13, 15, 16 dan 28 Akta, kesan mengikat keputusan adjudikasi adalah automatik; oleh itu keperluan bagi mana-mana pihak yang tidak berpuas hati atau terkilan terlebih dahulu memohon untuk mengetepikan keputusan adjudikasi. Ini terbukti dari syarat s 15 Akta (lihat perenggan 41).

(4) Penolakan permohonan perayu untuk penguatkuasaan atas alasan lebihan bidang kuasa tanpa pada masa yang sama, penolakan keputusan adjudikasi bukan sahaja akan memberikan interpretasi dan tafsiran yang akan mengalahkan tujuan Akta 2012, tetapi akan meninggalkan pihak-pihak dan mahkamah dalam kedudukan yang tidak sepadan dan tidak dapat dipertahankan. Undang-undang memberi responden pilihan untuk memfailkan permohonan untuk mengetepikan keputusan adjudikasi atas mana-mana atau semua alasan yang disediakan dalam s 15 Akta. Sekiranya pilihan tersebut tidak dilaksanakan, responden mesti mematuhi keputusan (lihat perenggan 56–57).]

Notes

For cases on construction contractin general, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4277–4232.

Cases referred to

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2018] 4 MLJ 496, CA (refd)

MRCB Builders Sdn Bhd v Southern Builders (J) Sdn Bhd [2018] MLJU 1426, CA (refd)

UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499; [2015] 5 CLJ 527, HC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2017] 1 LNS 1378, FC (refd)

Legislation referred to

Arbitration Act 2005 s 10
Construction Industry Payment and Adjudication Act 2012 ss 5, 6, 6(4), 13, 13(a), (b), (c), 15, 15(a), (b), (c), (d), 16, 16(1)(a), (1)(b), 23(1), 25, 27, 27(1), (3), 28, 28(2), (3), 31, 37, 41

Appeal from: Originating Summons No BS-24C-64–12 of 2017 (High Court, Shah Alam)

Kamraj Nayagam (Maya Gayathri with him) (Mah-Kamariyah & Philip Koh) for the appellant.
R Jayasingam (BH Lawrence & Co) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] In this appeal, the High Court had dismissed the appellant's application to enforce an adjudication decision dated 25 May 2017 rendered in its favour. Upon full deliberations and considerations of the records of appeal and the submissions of both learned counsel, we allowed the appeal.

THE CONSTRUCTION CONTRACT

[2] Pursuant to a letter of acceptance dated 13 November 2014, the appellant accepted its appointment by the respondent, as the subcontractor in the project known as 'Cadangan Projek Pembersihan Teluk dan Pembinaan Breakwater Sempena Langkawi ASEAN Summit 2015, Bandar Kuah, Daerah Langkawi, Kedah Darul Aman' for the sum of RM12,059,821. The employer of the project is Lembaga Pembangunan Langkawi ('LADA') while the respondent is the main contractor. The appellant's scope of subcontract works was to undertake, execute, construct and complete a fringing reef and tidal gates and, to lay geotextile and sand on the lagoon; the details of the nature of the subcontract works being found within the specifications ('subcontract works').

[3] The appellant carried out and completed the subcontract works on 14 April 2015 and, pursuant to the respondent's instructions, the appellant demobilised and left the site on 24 April 2015. The respondent thought otherwise and on 15 July 2015, it determined the appointment of the appellant as subcontractor in the project.

A THE ADJUDICATION

[4] In the course of the subcontract works, the appellant submitted to the respondent, a total of eight progress claims between 24 December 2014 and 14 April 2015. Of the eight progress claims, progress claims Nos 1, 2 and 3 were partially honoured while progress claims Nos 6, 7 and 8 were unpaid.

[5] The appellant then invoked the adjudication regime under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012') alleging non-payment of its progress claims. Pursuant to s 5, the appellant, as claimant, served on the respondent a payment claim dated 4 April 2016 for the sum of RM6,258,435.85 for the sums due under the progress claims issued to the respondent. On 18 April 2016, the respondent served its payment response on the appellant, disputing the entire amount. The payment response contained a cross-claim for the sum of RM4,189,029.43.

[6] The appellant issued two notices of adjudication. The first was on 20 May 2016. That adjudication ended without an adjudication decision due to the demise of the then adjudicator sometime in November 2016. On 22 December 2016, the appellant filed a second notice of adjudication for the same sum stipulated in the payment claim. In the second notice of adjudication, the appellant sought payment for the same sum of RM6,258,435.85. On 15 February 2017, a second adjudicator was appointed under s 23(1) of the CIPAA 2012.

[7] In the adjudication claim, details were given of the claim together with supporting documents. The appellant, inter alia, claimed that its eight progress claims totaled RM11,502,718.25 before the subcontract was terminated on 15 July 2015. To date, the appellant claimed to have only been paid RM5,244,282.10 for the first four progress claims while the last three, amounting to RM4,923,573 had yet to be paid.

[8] The reliefs sought by the appellant, inter alia, were as follows:

(a) an award of payment in the sum of RM6,258,435.85 (including deficit of previous progress claims No 1, 2 and 3) due and owing to the claimant as at 14 May 2015 (due date for progress claim 8 plus 30 days of honouring payment);

(b) in the alternative, the claimant is entitled to the sum of RM4,923,573 being outstanding payment for progress claim No 6, progress claim No 7 and progress claim No 8;

(c) in the further alternative, the claimant is entitled to the differences between the value of the works claimed for progress claim No 1, progress

claim No 2 and progress claim No 3 (RM5,380,281.25) less the sums paid to date by the respondent (RM4,045,481.40) ie RM1,334,862.85;

(d) interest on the sums; and

(e) costs.

[9] On 15 March 2017, the respondent issued and served its adjudication response, disputing entirely the claim and asserting a counterclaim for the sum of RM4,189,029.43. An adjudication reply was thereafter filed by the appellant.

[10] On 25 May 2017, the learned adjudicator gave his decision which was in the appellant's favour. At para 60 of the decision is a summary of the decision:

> Summary
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> 60. Upon reading all the documents submitted by Parties ie Adjudication Claim, Response, Reply and in their respective written submissions in reply together with all case laws and authorities and based on the reasons above, in summary, I find and hold that the Claimant is entitled for the sum of RM694,451.36 only.

[11] At para 70 of the decision, the learned Adjudicator further directed the respondent to pay the adjudicated sum 'in full on or by 5 working days from receipt of this adjudication decision in a form of secured financial instrument…'; 'interest at a rate of 5% per annum calculated as simple interest on the Adjudicated Sum from the Due Date for Payment of the Adjudicated Sum on any part of the Adjudicated Sum which remains unpaid until the same is paid in full'; and costs.

[12] The last date for payment under the adjudication decision was 30 June 2017. The respondent did not pay. In December 2017, the appellant filed an application pursuant to s 28 of the CIPAA 2012 seeking, inter alia, to recognise and enforce the adjudication decision dated 25 May 2017. This application was filed at the High Court sitting in Shah Alam. The instant appeal arises from this application which was dismissed on 26 March 2018.

[13] In the interim period, the respondent sued the appellant before the High Court sitting at Kuala Lumpur (WA-22C-3–01 of 2018), for non-completion of the subcontract works. In response to that civil action, the appellant filed an application for stay under s 10 of the Arbitration Act 2005. That application was dismissed.

A DECISION OF THE HIGH COURT

[14] The appellant's application for an order to enforce the adjudication decision under s 28 of the CIPAA 2012 was opposed by the respondent. The respondent did not file any application to set aside the adjudication decision under s 15. It did, however, file an application for stay under s 16(1)(b) — encl 7. That application was ultimately not pursued after the appellant's application was dismissed.

[15] Insofar as the appellant's application to recognise and enforce the adjudication decision was concerned, the respondent objected to the application, contending that the adjudicator had acted beyond his jurisdiction in allowing the sum of RM773,484.52. The respondent argued that there were 'clear and unequivocal errors' committed by the adjudicator in which case the application under s 28 must be refused. The respondent relied on the Federal Court's decision in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2017] 1 LNS 1378.

[16] The appellant submitted in response that since the respondent did not apply to set aside the adjudication decision, the respondent must be taken to have accepted that decision but has 'willingly refused to comply'. And, pursuant to s 13 of the CIPAA 2012, the decision is binding on the parties.

[17] The learned judge disagreed with the appellant, finding the respondent's contentions 'to have more weight'. Relying on s 15(d) of the CIPAA 2012, the learned judge held that it was for the court to intervene when the adjudicator has acted beyond his jurisdiction. It was the learned judge's findings that the adjudicator had acted in excess of his jurisdiction.

[18] According to the learned judge, since the adjudication claim was in respect of unpaid progress claims No 6, 7 and 8, that these claims were dismissed, that the sum of RM694,451.36 'was counted based on the interim payment No 5 which was never claimed by the plaintiff in the Adjudication Claim'; that the appellant was only entitled to what they have stated in their adjudication claim, 'it is clear that the adjudicator is not allowed to exceed his jurisdiction as the adjudicator's jurisdiction is limited to and within the confines of the payment claim, and he is not empowered to make an award for something not claimed for in the payment claims'.

OUR DELIBERATIONS AND DECISION

[19] Having carefully considered the law and facts, we find the decision of the learned judge, plainly erroneous.

[20] It is not in dispute that other than an application for stay under s 16 of the CIPAA 2012 (encl 7), and filing a civil action (Kuala Lumpur Civil Suit No WA-22C-3–01 of 2018), the respondent did not file any application under s 15 to set aside the adjudication decision. Instead, what the respondent did was to oppose the appellant's application, relying on sub-s 15(d), that the learned adjudicator had exceeded his jurisdiction by awarding a sum outside of the payment claim.

[21] Given this backdrop, the issue before us is whether it is open to a party such as the respondent who is resisting or opposing an application for enforcement under s 28, to raise any of the grounds under s 15 without actually filing an application under s 15 itself.

[22] In our view, the answer is clearly in the negative. It is not open to the respondent to invoke any of the grounds set out in s 15(a)–(d) in opposition to an application under s 28 without at the same time, filing an application under s 15 itself to set aside the adjudication decision on any of those grounds. Unless and until an application under s 15 has been initiated by the respondent, and an order has been granted setting aside the adjudication decision, the adjudication decision ought to stand unopposed on the grounds found in s 15(a)–(d). To accede to the respondent's submission that the court may avail itself to and dismiss an application for enforcement under s 28 by reason of any or all of the grounds under s 15 would, in our view, do violence to the terms of s 28.

[23] Section 28 reads as follows:

> 28 Enforcement of adjudication decision as judgment
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> (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
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> (2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
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> (3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

[24] Section 28 confers discretion on the High Court. Although there are no express terms as to how that discretion is to be exercised, in our opinion, the discretion must be exercised judiciously, having regard to the underlying facts and the applicable principles under the CIPAA 2012. We must also bear in mind principles of statutory interpretation; that we cannot read into s 28 terms which are not there, or give s 28 a construction which cannot bear up when the other provisions in the Act are read and taken into consideration.

[25] From a reading of the CIPAA 2012, in particular, ss 13, 15, 16, 27 and 31, it is plain that though s 28 vests the High Court with discretionary power, it does not extend to requiring the applicant to show that there are no grounds for setting aside the adjudication decision under s 15. All that the applicant needs to do is to satisfy the High Court that there is an adjudication decision that has been rendered in the applicant's favour, that there has been non-payment of the adjudicated sum by the date specified in the adjudication decision, and that there is no prohibition to the grant of the order that is sought.

[26] By this, we mean that the adjudication decision has not been set aside or stayed, that there is no written settlement of the subject matter between the parties, or that there is no final decision rendered on the payment claim, whether made in arbitration or by a court of law. Once these matters are established as matters of fact, the order to enforce ought to be granted. When making the order, the High Court may also make appropriate orders in respect of the whole or part of the adjudicated sum including make orders on interest — see sub-s 28(2).

[27] From the facts in this appeal, the appellant has amply satisfied the conditions that we have outlined. The learned judge was plainly wrong in dismissing an application in which case, the decision must be set aside and the appeal, allowed.

[28] In reaching the above decision, we state in clear and firm terms that we are unequivocal in our appreciation and agreement on the principles related to the application and operation of the CIPAA 2012; that it is intended to 'facilitate regular and timely payment' and 'to provide a mechanism for speedy dispute resolution through adjudication, to provide for remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters'. There is no lack of authority on this: see for instance *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2018] 4 MLJ 496; *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499; [2015] 5 CLJ 527; *View Esteem Sdn Bhd v Bina Puri Holdings Sdn Bhd* ; *MRCB Builders Sdn Bhd v Southern Builders (J) Sdn Bhd* [2018] MLJU 1426.

[29] This then sets the approach of the court when interpreting and construing the CIPAA 2012. In the occasions of dispute on interpretation, an approach which best facilitates as opposed to militating the object and purpose of the legislation is generally adopted by the court.

[30] The CIPAA 2012 contains fairly comprehensive provisions relating to, inter alia, the adjudication mechanism or regime. Broadly, the Act provides for

the process prior to the appointment of the adjudicator, where payment claims and responses have to be exchanged between the parties. This first part of the process defines the payment disputes between the parties. Where no payment response is filed, sub-s 6(4) provides that the payment claim is deemed disputed. And this is where the Federal Court decision in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2017] 1 LNS 1378 becomes relevant, a decision which we will return to later.

[31] The second part of the Act relates to the process where an adjudicator is appointed to adjudicate and resolve the payment dispute; where the necessary documents such as the adjudication claim, adjudication response and the adjudication reply are exchanged between the parties. There are fairly comprehensive provisions on the adjudicator's powers — see for instance, s 25.

[32] The third part of the CIPAA 2012 relates to the adjudication proceedings, where it is the adjudicator who takes charge of the payment dispute. The adjudicator deals with the payment dispute and determines that dispute. What merits mention here is the strict and relatively tight timelines for the various processes, with provisions for agreement to vary. This is understandable given the object and purpose of adjudication as a regime or mechanism for the speedy resolution of disputes over payments in construction contracts.

[33] Then comes the fourth part of the Act, dealing with enforcement matters. Upon determination, a decision is rendered. The parties to the adjudication are not required to go to court for a declaratory order as to the effect of the adjudication decision. The application to court, in the case of the successful claimant, is only for an order to enforce the adjudication decision and thence to execute it as if it is an order or judgment of the High Court — see s 28(3).

[34] The effect of an adjudication decision is clearly provided in s 13. It binds the parties to the adjudication save in three circumstances, as set out in s 13 itself:

> 13 Effect of adjudication decision
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> The adjudication decision *is binding* unless —
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> (a) it is set aside by the High Court on any of the grounds referred to in section 15;
>
> (b) the subject matter of the decision is settled by a written agreement between the parties; or
>
> (c) the dispute is finally decided by arbitration or the Court. (Emphasis added.)

[35] Both the claimant and the respondent are bound by the adjudication decision. Both parties are expected to fully abide by the terms of the decision unless any or all of the three circumstances specified in s 13(a)–(c), present. In the instant appeal, none of the circumstances mentioned in s 13 took place. The civil action that was filed had yet to be concluded, and there was no application to set aside the adjudication decision on any of the grounds referred to in s 15.

[36] Up to this stage of the adjudication regime, the court does not play any role. Again, this makes perfect logical sense because of what the CIPAA 2012 is in the whole scheme of payment dispute resolution.

[37] It is only where there has been non-compliance or, where a party is aggrieved with the adjudication decision or is unhappy with any of its terms, such a party would then invoke the jurisdiction of the court. For the party who has not been paid the adjudicated sum, by an application to court seeking an order to enforce the adjudication decision under s 28; whilst for the party who is aggrieved by the adjudication decision, by an application to either stay the effect (s 16) or to set aside (s 15), whether in whole or in part, the adjudication decision.

[38] Where the parties resolve the payment dispute by abiding by the terms of the adjudication decision and there is payment of the sum adjudicated, the matter ends. That resolution is, at least, for the interim period until final determination by arbitration or litigation, or where the subject matter of the decision has been settled by written agreement between the parties. As is frequently pointed out, parties may run other dispute resolution processes concurrently with adjudication. This is clearly provided under ss 31 and 37 of the CIPAA 2012:

> 31 Concurrent exercise of remedies
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> (1) Unless a stay is granted under section 16, a party who obtained an adjudication decision in his favour may exercise any or all of the remedies provided in this Act concurrently to enforce the adjudication decision.
>
> (2) The remedies provided by this Act are without prejudice to other rights and remedies available in the construction contract or any written law, including any penalty provided under any written law.
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> 37 Relationship between adjudication and other dispute resolution process
>
> (1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the Court.
>
> (2) Subject to subsection (3), a reference to arbitration or the Court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.

(3) An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the Court.

[39] The parties are, of course, entirely free to accept that adjudication decision and do nothing else in terms of challenge; or to even take the dispute, either on its own or together with other issues or disputes, be it to arbitration or to the courts.

[40] In the instant appeal, that was not the case. There was non-compliance with the adjudication decision. The respondent did not pay the adjudicated sum by the last date, that is, 30 June 2017. The appellant then invoked s 28, seeking an order that the adjudication decision may be enforced and then 'be executed in accordance with rules on execution of the orders or judgments of the High Court' under sub-s 28(3).

[41] In our view, from a proper reading of ss 13, 15, 16 and 28, the binding effect of the adjudication decision is automatic; hence the need for any dissatisfied or aggrieved party to first apply to set aside the adjudication decision. This is evident from the terms of s 15 which requires an aggrieved party to file an application before the jurisdiction of the court under s 15 may be invoked. In that application, the aggrieved party must specify in a supporting affidavit, the ground(s) relied on. It is important to note that s 15 envisages an exhaustive list of grounds as found in paras (a)–(d). Arguably, the court has no jurisdiction to entertain any other ground.

[42] Section 28 has already been set out while ss 15 and 16 read as follows:

15 Improperly procured adjudication decision

An aggrieved party *may apply* to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) the adjudication decision was improperly procured through fraud or bribery;

(b) there has been a denial of natural justice;

(c) the adjudicator has not acted independently or impartially; or

(d) the adjudicator has acted in excess of his jurisdiction.

16 Stay of adjudication decision

(1) A party *may apply* to the High Court for a stay of an adjudication decision in the following circumstances:

(a) an application to set aside the adjudication decision under section 15 has been made; or

(b) the subject matter of the adjudication decision is pending final determination by arbitration or the Court.

(2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the Kuala Lumpur Regional Centre for Arbitration or make any other order as it thinks fit. (Emphasis added.)

[43] We must point out that even in an application for stay of an adjudication decision under s 16, an application under s 15 to set aside the adjudication decision must still first be filed — see s 16(1)(a). Unless and until there is a positive challenge to the adjudication decision on any or all of the grounds statutorily provided under s 15, the respondent, at best, can only oppose the appellant's application for enforcement. Even then, the basis for opposing the enforcement application ought to be confined to the matters that we had averted to earlier. This construction is necessary so that the adjudication scheme may work effectively within the object and purpose of the Act.

[44] Further support for this view may be inferred from a reading of s 27(3). Section 27 provides:

27 Jurisdiction of Adjudicator

(1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.

(2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.

(3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 *or to oppose the application to enforce the adjudication decision under subsection 28(1)*. (Emphasis added.)

[45] We have no argument with the understanding of the learned judge that under s 27(1) of the CIPAA 2012, the jurisdiction of the adjudicator in relation to any dispute is limited to the matters referred to adjudication by the parties pursuant to ss 5 and 6 of the CIPAA 2012. Like arbitrations, adjudications are dispute resolution mechanisms enacted as alternatives to judicial process or litigation in courts of law. Unlike the judicial process, the decision maker in these alternative dispute resolution mechanisms are chosen by the parties. Hence, it is imperative that the adjudicator keeps within the limits of the dispute that was referred.

[46] However, we are not inclined to the view that the right to oppose the

enforcement application that is found in s 27(3) extends to incorporating a right to oppose on the grounds found in s 15, without more. On the contrary, s 27(3) is of limited application in that it pertains to jurisdictional challenges that despite being raised at the adjudication proceedings, the adjudicator decided to proceed and complete the adjudication. In such circumstances, the right to oppose the enforcement is not prejudiced but is preserved. The opposition nevertheless requires the respondent to apply and invoke the jurisdiction of the court under s 15. Section 27(3) does not confer passive jurisdiction of judicial intervention.

[47] Consequently, it was erroneous for the learned judge to have referred to and relied on the grounds found in s 15 when refusing the order sought by the appellant.

[48] In any event, the learned judge was plainly in error in his appreciation of the adjudication claim, what was in dispute between the parties, and the adjudication decision. According to the learned judge, the adjudication was in respect of unpaid progress claims Nos 6, 7 and 8. Although these claims were dismissed, the learned Adjudicator nevertheless proceeded to allow a sum of RM694,451.36, calculated based on interim payment certificate No 5. Since this was never claimed by the appellant in the adjudication claim, the adjudication decision allowing the sum of RM694,451.36 must be set aside as it was made in excess of jurisdiction.

[49] A closer examination of the adjudication decision ought to dispel that misunderstanding — see paras 11, and 44–48, in particular. adjudication is about resolving disputes on the value of and payment for work done or services rendered. In the present appeal, the appellant was clearly claiming for under and non-payment of its claims and it was open to the learned adjudicator to arrive at the decision that he did.

[50] From the adjudication decision, it is evident that what had happened was this. The appellant claimed that its works had achieved 95% completion. The adjudicator did not agree with the appellant on the percentage of completion. The adjudicator was, however, of the view that work was done by the appellant and that the appellant was entitled to payment. What the adjudicator did then was to use what he perceived to be the most reliable evidence of value of that work done, and that was the perakuan bayaran interim No 5 prepared by the consultant. That interim certificate certified that the appellant's works were of the value of RM694,451.36. The learned adjudicator relied and used that certificate as the basis of his decision. Given the extensive powers of the adjudicator under s 25 of the CIPAA 2012, we do not see any merit in the respondent's complaints, even if for a moment for argument's sake, a case may be made for allowing the respondent to rely on s 15(d) when

A opposing the enforcement application.

[51] Aside from the reasons already set out, we also cannot agree with the learned judge on the application of the Federal Court's decision in *View Esteem* to the present appeal. The factual matrix in that appeal is entirely different from
B our instant appeal.

[52] *View Esteem* was actually a decision involving three separate applications which were consolidated and heard together at the High Court. In *View Esteem*, the appellant had filed not only an application to stay the
C adjudication decision, it had also challenged and filed an application to set aside the adjudication decision under s 15 by reason, inter alia, that the adjudicator had acted in excess of jurisdiction; while the third application was the respondent's application for enforcement under s 28.

D

[53] On the issue of jurisdiction, the challenge there was on the non-application of the CIPAA 2012 to the particular construction contract under which the payment dispute arose. That question involved an interpretation of s 41 of the CIPAA 2012. The Federal Court took the view that
E such a jurisdictional challenge, described as an 'absolute lack of jurisdiction' may be taken up at any time. It was in coming to that view that the Federal Court remarked in the manner cited by the learned judge. Following its agreement with the appellant that there was an excess of jurisdiction, the appeal was allowed and the adjudication decision was set aside.

F

[54] That is not the case in our present appeal. The respondent's arguments never concerned the non-application of the CIPAA 2012. Its complaints were of the adjudicator acting in excess of the jurisdiction agreed by the parties; that instead of deliberating on the progress claims complained of, the learned
G adjudicator allowed the claim on a progress claim which was never the subject of the payment claim or adjudication claim.

[55] As repeatedly mentioned, we do not have any application to set aside the adjudication decision in the appeal before us. Even if for one moment,
H though we do not agree, that we could entertain the arguments of the respondent on the question of excess of jurisdiction in the manner proposed, the decision will nevertheless stand and be binding on the parties until it is set aside.

I **[56]** It is our opinion that a dismissal of the appellant's application for enforcement on the ground of excess of jurisdiction without at the same time, setting aside that adjudication decision would not only give a construction and interpretation which will defeat the purpose of the CIPAA 2012, but would leave the parties and the court in an incongruous and untenable position. That

is unpalatable. On the one hand, a refusal to grant an enforcement order because it is purportedly an improperly procured adjudication decision; and on the other hand, the binding effect of that adjudication decision.

[57] The law gives the aggrieved party, the respondent, the option of filing an application to set aside the adjudication decision on any or all of the grounds provided in s 15. Unless that option is exercised, the respondent must comply with the decision. This is regardless the complaint of jurisdiction, whether it is of core jurisdiction, competence jurisdiction or contingent jurisdiction, challenges on jurisdiction which are within the scope of s 15.

CONCLUSION

[58] With the above findings and conclusions, we are not required to go on and consider the matter of excess of jurisdiction and whether the learned judge was correct in his findings that there was excess of jurisdiction. The law, as it stands, does not warrant that examination. We have nevertheless conducted that examination but only for the sake of completeness.

[59] The facts show that there was more than adequate evidence before the court to warrant the grant of the application under s 28. The appeal is therefore allowed and the appellant's application for enforcement is accordingly allowed, with costs.

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali